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IN THE

Supreme Court of the United States

October Term, 1972

No. 72- 78-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Corning Glass Works, Petitioner herein, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, *infra*) is reported at 474 F.2d 226. The opinions of the district court are reported at 319 F. Supp. 1161 (App. B, *infra*) and 330 F. Supp. 46 (App. C, *infra*).

Jurisdiction

The judgment of the court of appeals was entered on February 2, 1973. On April 18, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to July 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether work at night is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

2. Whether, when a prior violation of the equal pay provisions of the Fair Labor Standards Act has occurred due to exclusion of women from higher paying jobs (here the steady night shift) and the employer has opened those higher paying jobs to women without reducing any employee's wage rate, the employer nevertheless is still in violation of the Act by reason of the prohibition in the Act against the reduction of wages in order to come into compliance.

3. Whether the equal pay provisions of the Fair Labor Standards Act prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the disputed jobs and protecting all persons, then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

Statute Involved

The statute involved is as follows:

Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d)(1):

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Statement

This suit was brought by the Secretary of Labor seeking to enjoin an alleged violation by Corning Glass Works ("Corning") of the equal pay provisions of the Fair Labor Standards Act,[1] and to recover wages allegedly due employees in accordance with the provisions of Section 17 of the Act.

The sole basis for the action is that Corning, at two establishments located in Corning, New York, paid cer-

[1] Act of June 25, 1938, 52 Stat. 1060, as amended, 29 U.S.C. § 201, *et seq.*

tain inspector job classifications more money for work on a steady night shift than for work on jobs having the same titles on day shifts.

The fact findings of the district court show that during the late 1920's Corning began to produce glass products with sufficient speed that it became necessary for the first time to employ inspectors on a night shift (App. B, *infra*, p. 50). In 1930 women filled most of the inspection jobs on the day shifts (App. B, *infra*, p. 50).

At that time New York law prohibited the employment of women between the hours of 10:00 p. m. and 6:00 a. m.[2]

In those days Corning did not bargain with a labor union; thus, there was no contract providing payment of a formal shift differential to compensate employees working a steady night shift (App. B, *infra*, p. 50). Corning had to pay a higher wage rate to persuade people to perform the inspection jobs on the steady night shift (App. B, *infra*, p. 50).

These pay practices continued until World War II during which time the district court found not only that Corning was permitted to employ women on the steady night shift jobs but also that the women were paid the higher steady night shift wage rate—the same rate paid to men working as inspectors on that shift (App. B, *infra*. pp. 50-51).

In 1944 a union organized Corning's employees and negotiated a labor agreement which included a shift differential for steady night shift work and which added per-

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[2] Law of March 30, 1927, ch. 453, § 172 (1927) N.Y. Laws; Law of April 28, 1930, ch. 868, § 172 (1930) N.Y. Laws (which carried forward, without change, the prohibition against night work by females) (App. B, *infra*, p. 50).

centage increases to the pre-existing base rates of all inspection jobs (App. B, *infra*, p. 51).

After World War II New York law again prohibited the employment of women at night (App. B, *infra*, p. 51).

New York law was amended in 1953 to permit women over 21 years of age to work after midnight where the State Industrial Commissioner granted his approval.[3] Until January 1, 1970, the New York Commission's policy provided that the Commissioner's approval would only be granted where, *inter alia*, the collective bargaining agreement did not prohibit such employment.[4]

Corning had unsuccessfully sought the union's agreement to open the steady night shift to women as early as the 1950's. However, the union's agreement was not obtained until June 1, 1966 (App. B, infra, p. 54).

After June 1, 1966, women in substantial numbers were employed on the steady night shift as the turnover in these jobs was substantial and over half the vacancies were taken by women (App. A, *infra*, p. 29; App. B, *infra*, p. 54). Thus, as the district court found, all wage increases which accrued to the jobs here involved, subsequent to June 1, 1966, regardless of shift, were received by men and women alike (App. B, *infra*, pp. 60-61).

Finally, as the circuit court found Corning and the union negotiated a new contract effective January 20, 1969, which included a job evaluation plan which abolished the rate difference between steady night inspection work and

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[3] Law of April 13, 1953, ch. 708, § 172 (1953) N.Y. Laws.

[4] N.Y. Labor Law § 173 (McKinney 1965); *cf.* 2 CCH Lab. L. Rep., State Laws ¶44,501 at 56,781 (1970) for a recent codification of similar regulations.

day inspection work and increased the day rates so that rates were the same on all shifts and higher than the previously existing steady night shift wage rates (App. A, *infra*, p. 29). The district court had found that the above "job evaluated" rate was "fair, non-discriminatory . . . [and] not based on sex" (App. C, *infra*, p. 70). The agreement also provided that every person, regardless of sex, employed by Corning prior to its effective date, January 20, 1969, would receive an even higher "red circle" rate when employed on a steady night shift inspection job (App. A, *infra*, pp. 29-30; App. C, *infra*, p. 70).

The district court found that work on a steady night shift was not under a similar condition as day work but, nevertheless, concluded that Corning had violated the Equal Pay Act by maintaining a higher base wage rate for the inspection jobs on the steady night shift on the ground that the contract shift differential "adequately" compensated employees for working undesirable hours (App. B, *infra*, p. 62).

The district court failed to discuss the question of whether Corning had complied with the Act by opening the steady night shift jobs to women on June 1, 1966; however, the court ruled that the agreement of January 20, 1969, had cured the violation and denied the Secretary's request for an injunction beyond that date (App. B, *infra*, p. 67).

Subsequently, the district court granted the Secretary's motion, under F. R. Civ. P. Rule 52, to amend the court's fact findings and to obtain additional findings and further injunctive relief. The district court issued a second opinion (App. C, *infra*) in which the court, in part, reversed its prior finding, concluded that the 1969 agreement also violated the Equal Pay Act, by reason of the inclusion of the "red circle"

rate provision, and ordered Corning to raise the wage rates of the day shift inspection jobs to the level of the "red circle" rates. Finally, the district court issued a "nationwide injunction" covering all Corning facilities, except the Wellsboro, Pennsylvania, plant, which was involved in a similar litigation. This injunction directed Corning in general terms to obey the Equal Pay Act (App. C, *infra*, pp. 74-76).

The court of appeals sustained the district court's rulings holding that the payment of the higher steady night shift rate violated the Equal Pay Act and that the 1969 "red circle" rate agreement failed to cure the violation. The court of appeals also considered and rejected Corning's contention that the opening of the jobs to women in June, 1966, cured the violation. The circuit court struck down the "nationwide injunction" since it was not supported by the evidence (App. A, *infra*, pp. 42-44).

The Second Circuit rejected the district court's view that the Act could be applied even where working conditions on the comparison jobs were different (App. A, *infra*, p. 32). However, the Second Circuit held the Act to be applicable because, although the resolution of the issues was "not free from doubt" (App. A, *infra*, p. 30) and the result, perhaps, seemed "harsh" (App. A, *infra*, p. 42), that court concluded that the legislative history of the Equal Pay Act indicated that Congress did not intend that the difference between night work and day work be recognized as a different "working condition" under the Act (App. A, *infra*, p. 32).

Similarly, the court of appeals concluded that Corning's opening of the night jobs to women in 1966 failed to cure the violation because the court adopted the view that the legislative history indicated that the proviso in the Act

which prohibits a reduction of wage rates in order to comply with the Act, really means that wage rates must be increased (App. A, *infra*, p. 40).

Finally, the court of appeals ruled that the introduction of a comprehensive job evaluation plan in 1969, accompanied by an increase of the disputed rates beyond the prior steady night shift rate, failed to cure the violation because Corning agreed to continue to pay all persons employed on the date of the agreement an even higher rate for steady night shift work. The court held this "red circle" rate to "perpetuate" the violation (App. A, *infra*, p. 41).

Reasons for Granting the Writ

1. Whether work at night is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

The decision below is in direct conflict, on the threshold issue in dispute, with the decision of the district court in *Hodgson v. Corning Glass Works*, 341 F. Supp. 18 (M.D. Pa. 1972), a case between the same parties, which is presently pending before the United States Court of Appeals for the Third Circuit. The Third Circuit has heard argument but has not yet issued a decision. The district court in that case held that "a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar . . . ." 341 F. Supp. at 21.

a. The issue of whether night is a different working condition than day within the meaning of the Equal Pay Act affects each of the thousands of businesses around the country which employ persons to work at night at higher rates of compensation than day workers. Review by this Court is thus essential to the correct and orderly administration of the Act in accordance with the intention of Congress.

b. The court below erred in holding that the legislative history required it to conclude that work at night is not a different working condition than day work within the meaning of the Equal Pay Act.

Common experience as well as all of the competent authorities in physiology and sociology make it plain that night work is not under a similar condition as day work. Judge Friendly clearly recognized this truth—during oral argument he stated from the bench: "You'd have to pay me twice as much to work at night." Moreover, in its opinion the Second Circuit conceded that the resolution of the issue was "not free from doubt" (App. A, *infra*, p. 30) and that the result, perhaps, seemed "harsh" (App. A, *infra*, p. 42).

It is plain that the Second Circuit was persuaded to this doubtful and perhaps harsh result—contrary to every man's experience and to the ordinary use of the words—because the court accepted the Secretary's reading of the legislative history.

The Secretary persuaded the Second Circuit to accept an incorrect interpretation of certain statements in a Report by the House Special Subcommittee on Labor which we will review below along with the other relevant legislative history necessary to properly understand that Report. 109 Cong. Record, House, May 23, 1963, p. 9209 (App. D, *infra*).

Representative Charles Goodell, as the court below found, was the sponsor of the Equal Pay Act (App. A, *infra*, p. 34) and was a member of the Special Subcommittee on Labor which redrafted and reported the Bill to the House.

Mr. Goodell read the Subcommittee Report in question into the Congressional Record.

Immediately prior to reading the Report into the Congressional Record, Representative Goodell stated "Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill." Goodell proceeded to read into the Congressional Record fifteen such "examples and guidelines." These statements were obviously deliberately prepared with great care and, from the context of Goodell's statement, it appears certain that he was speaking for the Subcommittee. Among the "examples and general guidelines" was the following:

> "Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" [Emphasis supplied] 109 Cong. Record, House, May 23, 1963, p. 9209 (App. D, *infra*, p. 82).

This statement, made by the sponsor of the Bill immediately prior to reading the Subcommittee Report into the

Congressional Record and proclaimed as an example and general guideline as to the intent of Congress, is the *only statement* on the point in dispute which is *clear* and *unambiguous.*

Goodell stated plainly that a difference in hours of work or shift was intended by Congress to constitute a difference in working conditions within the meaning of the Equal Pay Act.

The court below felt that Goodell's clear statement of Congressional intent was outweighed by the following statement in the Subcommittee Report (which Goodell also read into the Record):

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. . . ." 109 Cong. Record, House, May 23, 1963, p. 9210 (App. D, *infra*, p. 87).

The opinion of the court below interlineated the words "differentials based on any other factors other than sex," in brackets, after the words "the broad general exclusion" in the next to last sentence in the quoted paragraph, indicating the court's belief that the "broad general exclusion" referred to was a "factor other than sex" upon which the Act permits wage rates to be based (App. A, *infra*, p. 34). Although it is not entirely clear, this is probably a correct interpretation.

The court concluded, without apparently considering other possibilities, that the examples listed in the last quoted sentence, which begins with the word "Thus" were intended as examples of a "factor other than sex."

The court's interpretation is demonstrably incorrect and would make the Subcommittee Report internally inconsistent. The sentence beginning with the word "Thus" could not have been limited to examples of "factors other than sex" because that sentence included the example of "lifting or moving heavy objects." Lifting or moving of heavy objects is, beyond dispute, an example of "effort." "Effort" is, of course, along with "working conditions" one of the specifically listed requisites of the Equal Pay Act. It seems clear that the sentence beginning with the word "Thus" sums up, by example, those matters to which the Act was not intended to apply.[5]

Representative Goodell's prepared statement setting forth examples and guidelines as to the intent of Congress, quoted above at p. 10, *supra*, is a direct clarification of any ambiguity in that paragraph of the Subcommittee Report which is misinterpreted by the Secretary and by the Second Circuit.

Subcommittee Report:	Goodell stated:
"Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded. . . ."	"Ninth . . . Finally . . . hours of work, difference in shift, all would logically fall within the *working condition* factor." [Emphasis supplied]

[5] It is important to note that the two paragraphs in the Subcommittee Report which preceded the paragraph relied upon by the Second Circuit discussed skill, effort, responsibility and working conditions. 109 Cong. Record, House, May 23, 1963, p. 9210 (App. D, *infra*, p. 86).

Subcommittee Report:	Goodell stated:
"Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded. . . ."	"Ninth . . . The usual factors of push, pull, lift, and carry come under *effort*. . . . ." [Emphasis supplied]
"Thus, among other things . . . differences based on experience, training, or ability would also be excluded. . . ."	"Ninth . . . such things as experience, ability, and training may be considered under the broad heading of *skill*. . . . ." [Emphasis supplied]

Goodell's prepared statement as to the intent of Congress is not contrary to the Subcommittee Report—it is complimentary to it and specifically explains and clarifies its meaning.

In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951), this Court, in construing the legislative history of the Miller-Tydings Act indicated that remarks by sponsors of a statute, such as Representative Goodell's, should be given great weight in the resolution of any uncertainty in the words of that statute.

The Second Circuit also seemed to place some reliance upon the fact that Corning's then manager of industrial relations research had testified before the House Subcommittee about Corning's Job Evaluation Plan and had said nothing about time of day worked as a working condition (App. A, *infra*, pp. 32-33).

The fact is that work on a steady night shift is a working condition of such importance that unions and companies are seldom, if ever, willing to include it in negotiated job evaluation plans because to do so would fix its value in relation to other job factors. Unions and companies want to be free to negotiate the value of this

condition, which, as the district court in the Third Circuit case found is "a condition of employment which can affect an employee's work more than disagreeable surroundings or exposure to hazard." *Hodgson* v. *Corning Glass Works, supra*, 341 F.Supp. at 21.

We respectfully submit that the court below erroneously decided this issue.

The Second Circuit accepted the Secretary's analysis of legislative intent which was incomplete and erroneous.

The paragraph of the Subcommittee Report upon which the Second Circuit relied is internally inconsistent when interpreted as the Second Circuit suggests is proper. It is harmonious when read as we suggest and is also entirely consistent with the explanation and clarification read into the record by the sponsor of the Bill.

It is clear that the Equal Pay Act was not intended to be applied to compare jobs which are not substantially equal. Congress did not want the Secretary to attempt to evaluate jobs on which there were real and substantial differences.

2. Whether, when a prior violation of the equal pay provisions of the Fair Labor Standards Act has occurred due to exclusion of women from higher paying jobs (here the steady night shift) and the employer has opened those higher paying jobs to women without reducing any employee's wage rate, the employer nevertheless is still in violation of the Act by reason of the prohibition in the Act against the reduction of wages in order to come into compliance.

This Question, as well as Question 3, deals with certain recurring and important issues in the enforcement of and compliance with the Act in situations where prior violations or potential violations have occurred. The reasons for granting a writ of certiorari which are discussed under this Question are also generally applicable to the granting of a writ of certiorari as to Question 3.

a. The manner by which compliance with the Act can be achieved has never been considered by this Court.

b. These matters are plainly of broad general application and importance since they confront all employers, employees, and unions faced with remedying violations of the Act.

c. The court below incorrectly decided this Question.

On June 1, 1966, Corning opened the higher paying night shift inspection jobs to women (App. B, *infra*, p. 54). After that date both men and women received both the day inspection rate and the night shift inspection rate (App. B, *infra*, p. 54). After that date there were no distinctions in the wage rate paid to either sex (App. B, *infra*, pp. 60-61).

The Second Circuit held (App. A, *infra*, p. 40) that Corning had not achieved compliance with the Act because Corning was in violation of what is called the "reduction proviso" of the Act which states:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

There was neither proof in the record nor any finding by any of the courts below that an employee's wage rate had been reduced. Of course, no employee's wages had been reduced, because the action Corning took to achieve compliance with the Act was to open up the night shift inspection jobs to women.

However, the Second Circuit has decided that the phrase "shall not reduce" should be interpreted to mean "shall increase the wage rate of the lower rated job" (App. A, *infra*, p. 40). The Second Circuit has rewritten the Act to require that in every case of violation the wage rate of the lower rated job must be increased to the level of the higher rated job.

For the following reasons, we believe that the Second Circuit erred in so rewriting the Act.

The interpretation of the Second Circuit is in conflict with the specific language of the Act. The requirement that rates may not be *reduced* does not justify the conclusion that compliance cannot be achieved unless the lower rated job is *increased*.

Although it indicated some persuasion to Corning's position, the Second Circuit felt compelled by certain legislative history from the House of Representatives to hold that the lower rated job must always be increased

to the higher rate (App. A, *infra*, p. 40).[6] Corning believes that this was a mistake. First, legislative history should not be used to change the clear meaning of the words of the Act.[7] Further, although it is true that the legislative history in the House contains statements that the lower rate should be increased, those statements do not establish that the House intended to rule out the possibility that compliance could be achieved through the opening of the higher rated job to women. Actually those statements in the House legislative history seem to have been intended merely as a rejection of the possibility that compliance might be achieved through a reduction in the rate of the higher rated job.[8] The legislators in the House, as well as in the Senate, seem to have been essentially concerned with prohibiting the reduction of the wage rate for the higher rated jobs. Senate Report No. 176, for example, makes clear that the Senate felt that the "reduction provision" was aimed at establishing that an "individual's present economic status" would not be adversely affected by the enactment of the legislation.[9] This prohibition against a reduction of the higher rate is precisely what Congress did in the explicit language of the Act.

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[6] The Second Circuit referred (App. A, *infra*, p. 40) to statements of Representative Griffin in *Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Education and Labor*, 88th Cong., 1st Sess. 65 (1963) and H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963).

[7] *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

[8] *E.g.*, Representative Thompson stated: "The lower wage rate must be increased to the higher level *so that there will not be an adverse effect on already established wage patterns.*" [Emphasis supplied] 109 Cong. Record, House, May 23, 1963, p. 9196. Representative Thompson's statements indicate that he was considering only the alternatives of increasing the lower rate or reducing the higher. Opening the higher rated job to women obviously does not have "an adverse effect on already established wage patterns."

[9] S. Rep. No. 176, 88th Cong., 1st Sess. (1963), 109 Cong. Record, Senate, May 17, 1963, p. 8915.

The court below also relied upon decisions in two other circuits in rationalizing its conclusion.[10] Those decisions should not be read as establishing the rule that the lower rated job must always be increased to the higher rate. In *Hodgson* v. *Square D Co.*[11] and *Shultz* v. *American Can Co.–Dixie Products*[12] the Sixth and Eighth Circuits, respectively, dealt with situations in which the higher rated jobs were opened to women but the women had not actually been able to work on those jobs.

There are good reasons in policy why the Act reads as it does and why the courts should not rewrite it to require that the lower rated job must always be increased to the higher rate.

Congress intended to afford maximum flexibility to the collective bargaining system in adjusting rate relationships.[13] The rule proposed by the court below eliminates these matters from collective bargaining and mandates an

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[10] App. A, *infra*, pp. 40-41. In a third case, to which the Second Circuit made only a comparison citation, *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 226 (7th Cir. 1972), the Seventh Circuit noted that Miller Brewing, through a complex system of transferring employees, "arrived at the same result as if it had initially, after the effective date of the Equal Pay Act, equalized pay in the Analytical Lab by lowering the male employees wages by 70 cents per hour."

[11] 459 F.2d 805, 808 (6th Cir.) *cert. denied*, 409 U.S. 967 (1972). The Eastern District of Kentucky discussed the fact that women had been discouraged from taking the higher rated job. 19 Wage and Hour Cases 752, 754 (E.D. Ky. 1970).

[12] 424 F.2d 356, 359 (8th Cir. 1970).

[13] An example of this intention to allow a maximum of freedom in setting rate relationships is found in statements made, in the course of debate on the bill, by Congressman Goodell that Congress wanted "the private enterprise system, employer and employees and a union, if there is a union, and the employer and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it" as long as the pay differentials were not based on sex. 109 Cong. Record, House, May 23, 1963, p. 9198.

increase in the lower rate even if the employer and the union believe that the jobs should not bear the same wage rate. The Second Circuit's rule will usually be disruptive of the many rate interrelationships between the jobs which are being litigated and the other jobs in the employer's establishment. This disruption can have far reaching effects upon employee job bidding tendencies and create employee dissatisfaction with rate inequities caused by this disruption.

The rule adopted by the court below conflicts in principle with the approach taken by the courts attempting to remedy sex and race discrimination under Title VII of the Civil Rights Act of 1964.[14] There is no good reason why a federal court should be mandated to apply a different and more harsh remedy to a case which is brought under the Equal Pay Act than the remedies available to that court if the same factual situation were attacked under the sex discrimination prohibitions of Title VII.

Similarly, the Second Circuit's rule makes no adjustment for situations, such as the instant one, where an employer has excluded women from a job because of state protective legislation.[15] Recent decisions under Title VII

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[14] Act of July 2, 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e, *et seq.* In *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 422 n. 5 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), for example, one of the main contentions was that the Terminal considered only whites for jobs affording better pay. The Fifth Circuit did not order that the wage rates of "black" jobs be raised to the wage level of "white" jobs. The Fifth Circuit ordered the employer to do exactly what Corning did on June 1, 1966, *i.e.*, permit members of the allegedly affected class to take the better paying jobs, as vacancies occur.

[15] See pp. 4-5, *supra*. Although the Second Circuit opinion does not recognize this fact, Corning was prohibited by the New York protective laws from opening the night shift to women before the union agreed. Corning was not able to obtain union approval until June 1, 1966.

of the Civil Rights Act of 1964 have recognized the inappropriateness of imposing liability under the federal statute where sexual exclusion from jobs has been based upon state protective legislation.[16]

For all of these reasons, Corning believes that this Court should grant a writ of certiorari to determine whether the phrase in the Act which prohibits reductions should be rewritten, as the Second Circuit has done, to mandate increases in every instance.

3. Whether the equal pay provisions of the Fair Labor Standards Act prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the disputed jobs and protecting all persons, then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

a. This Question, in conjunction with Question 2, is extremely important to the correct and orderly administration of the Act because every employer who is faced with a potential equal pay violation must seek a form of compliance with the Act which will not be disruptive of fair, nondiscriminatory rate relationships among the jobs potentially affected by an equal pay problem and all of the other jobs in the enterprise and to which he can attain union acceptance.

b. The court below incorrectly decided this Question.

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[16] *E.g., Kober* v. *Westinghouse Elec. Corp.*, _____ F.2d _____, 109 Daily Labor Reports (June 6, 1973) E-1 (3rd Cir. May 25, 1973); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, _____ U.S. _____, 41 U.S.L.W. 3445 (1973); *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228 (5th Cir.) (per curiam), *cert. denied*, 409 U.S. 990 (1972); *Rosenfeld* v. *Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971).

By 1969 Corning believed that it had certainly achieved compliance with the Act by permitting women to work on the comparison jobs from which they had been excluded and evaluating the rate which should be paid for the work on the comparison jobs on the basis of a fair and non-discriminatory system which developed a fair wage rate for that work in comparison with all of the jobs in the employer's business.

In January, 1969, Corning negotiated a job evaluation plan with the union which the district court found had rated the disputed jobs, and all other jobs, in a fair and non-discriminatory manner, not based on sex (App. C, *infra*, p. 70). Although this admittedly fair rate was higher than the rate of the higher rated night job prior to the agreement, in order to reach agreement with the union Corning agreed to "red circle" *all persons* employed on the date of the agreement to a rate which was even higher than the fair job evaluated rate when those persons worked on the night job.

The court below conceded that had Corning done no more than install the job evaluation plan, which fairly rated the disputed jobs, there could have been no serious claim of a continued violation (App. A, *infra*, p. 29). However, the Second Circuit held that the "red circle" rate perpetuated discrimination (App. A, *infra*, p. 41).

Since the jobs are fully integrated, the "red circle" rate provided by the January, 1969, agreement has been received by both men and women. Eventually that "red circle" rate would be phased out as those persons who were employed in January, 1969, retire, quit or bid on other jobs. We do not see how it perpetuates any discrimination.

The court below has required that Corning raise the admittedly fair and non-discriminatory job evaluated rate

to the level of the "red circle" rate. Thus, the court has required Corning to create an inequity in rate relationships which can only be resolved by raising the entire wage curve, affecting all jobs, which would involve a prohibitive cost.

Every employer who is faced with the dual problems of a violation or potential violation of the Equal Pay Act and of bargaining with a union will inevitably seek a sensible means of compliance which will involve "red circle" rates and which will run afoul of the decision of the court below in this case.

The rule established by the court below is not required by the Act and is contrary to the expressed intent of Congress to grant wide latitude to the free process of collective bargaining to establish wage rates.[17]

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[17] See note 13, *supra*.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-

CORNING GLASS WORKS, a Corporation,
Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix A—Opinion of the Court of Appeals, 474 F. 2d 226.

Appendix B—Opinion of the District Court, 319 F. Supp. 1161.

Appendix C—Opinion of the District Court, 330 F. Supp. 46.

Appendix D—109 Cong. Record, House, May 23, 1963, pp. 9209-11.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 252, 349—September Term, 1972.

(Argued January 4, 1973 Decided February 2, 1973.)

Docket Nos. 72-1229
72-1230

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Appellee,

v.

CORNING GLASS WORKS, a Corporation,

Appellant.

Before:

FRIENDLY, *Chief Judge,*

KAUFMAN, *Circuit Judge,* and HOLDEN,* *District Judge.*

Appeal from a judgment of the District Court for the Western District of New York, John T. Curtin, *Judge,* 319 F. Supp. 1161, 330 F. Supp. 46, in an action by the

* Chief Judge of the District Court for the District of Vermont, sitting by designation.

Secretary of Labor under the equal pay provisions of the Fair Labor Standards Act, awarding back pay and enjoining future violations.

Modified and affirmed.

Carin Ann Clauss, Esq., Associate Solicitor (Richard F. Schubert, Esq., Solicitor of Labor, Francis V. LaRuffa, Esq., Regional Solicitor, Donald S. Shire, Esq., Helen W. Judd, Esq., Isabelle R. Cappello, Esq., and Sylvia S. Ellison, Esq., Attorneys, of Counsel), *for Appellee.*

Scott F. Zimmerman, Esq., Pittsburgh, Pennsylvania (Reed, Smith, Shaw & McClay, John G. Wayman, Esq., and Walter P. DeForest, Esq., Pittsburgh, Pennsylvania, of Counsel), *for Appellant.*

FRIENDLY, *Chief Judge:*

This appeal marks this Court's first encounter with the Equal Pay Act of 1963, 29 U.S.C. § 206(d), one of the many beneficent remedial statutes enacted during the last decade which create new tasks for the federal courts. The burden is increased, perhaps needlessly, because, as is the case with other provisions of the Fair Labor Standards Act of which it forms a part, the Equal Pay Act has no provision for administrative fact-finding.

The controlling statute, 29 U.S.C. § 206(d)(1), of seeming simplicity, reads as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, be-

> tween employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

I.

Since the parties broadly accept the factual findings of the district court, a brief summary will suffice.

The controversy concerns the wages paid by Corning Glass Works ("Corning") to Class B, Class C, and General TV inspectors,[1] in its A Factory, B & C Factory, and Pressware Plant at Corning, New York. Prior to 1925, Corning operated its plants only during the day, and found it unnecessary or undesirable to have a night shift. Between 1925 and 1930, however, the introduction of automatic production equipment made it necessary to institute a night inspection shift. Although, as the dis-

[1] Although the Secretary of Labor previously claimed that the wages paid to a fourth class of employees, TV Inspectors, also violated the Equal Pay Act, the district court seemingly held that the Secretary had not met his burden of proof that the work done by men and women on these jobs was equal and did not include these jobs in its back pay award. See *Shultz* v. *Corning Glass Works,* 319 F. Supp. 1161, 1168, 1171 (W.D.N.Y. 1970). The Secretary has not appealed this aspect of the district court's order.

trict judge found, *Shultz* v. *Corning Glass Works*, 319 F.Supp. 1161, 1170 (W.D. N.Y. 1970), previously "women had filled most, if not all, of the inspection jobs on the day and afternoon shifts," New York law[2] then prohibited the employment of women between 10:00 P.M. and 6:00 A.M., and thus Corning had to recruit male employees for a steady night shift. They demanded and received wages comparable to what they were earning on other, often more demanding jobs in the plant, which were approximately twice those paid to the female inspectors. The base rate for the inspectors on the night shift was 53 cents per hour, as against 24 to 28 cents per hour for the female inspectors on the day shifts.

Thus a situation was created where the night inspection shift was all male, the day shift virtually all female, and the males received wages significantly higher than the females. This state of affairs persisted until the effective date of the Equal Pay Act—and beyond it—except for one brief period when, because of labor shortages during World War II, New York allowed women to work at night; women employed by Corning on the night shift during that period received the same wages as the men when they performed the same work. In 1944 the Corning, New York plants were organized by the American Flint Glass Workers Union and a collective bargaining agreement was negotiated which provided for the company's first plant-wide night shift differential.[3] But this change

[2] 1927 N.Y. Laws, ch. 453; 1930 N.Y. Laws, ch. 868.

[3] The record does not reveal whether, apart from the inspectors, Corning had paid more for night work before the institution of the plant-wide differential in the 1944 agreement. Corning suggested

(Footnote continued on following page)

in Corning's wage structure did not eliminate the higher base wage paid to male night inspectors since, in the case of the inspectors, the shift differential was superimposed upon the existing difference in wage scales. Similarly, although in 1953 New York changed its law to permit females over the age of 21 to work after midnight in factories operating multiple shifts where the Industrial Commissioner found transportation and safety conditions to be satisfactory and granted approval,[4] the record does not reveal any application by Corning for such approval prior to 1966.

The Equal Pay Act became effective with respect to Corning's Corning, New York plants on June 11, 1964.[5] Since Corning had previously maintained separate "male" and "female" rate schedules plant-wide, with the latter materially lower, the Act clearly called for action on its part. Corning therefore merged the separate schedules into one. However, so far as concerned the inspectors, this was a matter of theory only, since the day shift inspectors were assigned to lower wage groups, see 319 F. Supp. at 1165-66. Thus, as the district court found, 319

(Footnote continued from preceding page)
that there might have been other jobs performed by women during the day for which the company had to pay a higher wage to get men to perform at night. It seems relatively clear, however, that if a job had been performed on the day shift by men, men on the night shift would receive the same wage.

[4] 1953 N.Y. Laws, ch. 708, *amending* N.Y. Labor Law § 172, *now* N.Y. Labor Law § 173(3)(a)(1) (McKinney 1965).

[5] It was stipulated that the statute of limitations barred all claims arising prior to November 1, 1964 and that any back pay awards in this action should run only from that date.

F. Supp. at 1166, "the merger continued the historical difference in base hourly rates of the men and women inspectors working the three shifts."

Corning's first significant step toward eliminating the differential wage rates for male and female inspectors took place on June 1, 1966, when it opened the inspection jobs on the night shift to women, presumably with the approval of the State Industrial Commissioner. At this time Corning consolidated its theretofore separate male and female seniority lists, and women became eligible to bid for the higher paid night inspection jobs when vacancies occurred. It is undisputed that a considerable number of women took advantage of this opportunity; turnover in the night inspection jobs was substantial and over half the vacancies were taken by women. Still, the process required some time since women could not exercise their seniority to "bump" a less senior male night inspector.[6]

The last significant event was Corning's negotiation of a new collective bargaining agreement with the Flint Glass Workers Union, effective January 20, 1969. This abolished the separate base wage rates of day and night shift inspectors and increased the rate for all inspectors, so that the resulting base wage was the same for all three shifts and exceeded the wage rates on the steady night shift previously in effect. If the agreement had stopped at that point, there could be no substantial claim of further violation of the Equal Pay Act. However, the agreement provided for a higher "red circle" basic rate to every person

[6] In 1966 only 4 of 15 women requesting transfer to the night shift received this. The situation later improved so that 39 out of 61 requests were honored in 1967, and 42 out of 52 through November 7 in 1968.

employed before January 20, 1969, when working as an inspector on the night shift. At the time of the last hearing in the district court, over two years after the new agreement went into effect, all the night inspectors were being paid at the "red circle" rate; unless Corning changes its system, this is likely to continue for some time since at the date of the hearing over 500 laid-off inspectors had to be offered reemployment before any new inspectors could be hired.

The district court held that Corning had been in continuing violation of the Equal Pay Act; directed it to pay the night rate to all inspectors from November 1, 1964, see note 5 *supra*, to January 20, 1969, and the "red circle" rate thereafter to all inspectors until true equalization was effected; awarded interest at the rate of 6% per annum on the amounts withheld; and issued an injunction against future violations of the Act of any kind with respect to all categories of employees at all plants except the branch plant at Wellsboro, Pennsylvania.[7] Corning claims that it was never in violation of the Equal Pay Act; that if it was, any violation ended on June 1, 1966, when women became eligible to work on the night shift, or, at latest, on January 20, 1969, when the differences in basic wage rates were abolished; and that the broad injunction was unjustified. Although the issues are not free from doubt, we reject all contentions save the last.

[7] The reason for the exception was that an action with respect to the Wellsboro plant, on facts similar to those in the instant case, was then pending in the District Court for the Middle District of Pennsylvania. This has since been decided in favor of Corning, *Hodgson* v. *Corning Glass Works*, 341 F. Supp. 18 (1972), and is now on appeal to the Third Circuit.

II.

The parties are in agreement on the general approach we should follow. The initial question is whether the inspection jobs on the day and night shifts constituted "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." The Secretary has the burden on this, *Shultz* v. *American Can Co.*, 424 F.2d 356, 360 (8 Cir. 1970); *Hodgson* v. *Brookhaven Gen'l Hosp.*, 436 F.2d 719, 722 (5 Cir. 1970), and, if he has not sustained it, the complaint must be dismissed even if the wage differentials were unreasonably large in comparison with the actual differences in skill, effort, responsibility, or working conditions, and were based on discriminatory motivation; Congress did not intend to put either the Secretary or the courts in the business of evaluating jobs and determining what constituted a proper differential for unequal work. See 109 Cong. Rec. 9197-98, 9209 (1963); *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 227 (7 Cir. 1972). The Secretary also has the burden of establishing a prima facie case that the wage differentials represent "discriminat[ion] . . . on the basis of sex." *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3 Cir.), *cert. denied*, 398 U.S. 905 (1970). Once the Secretary has sustained these burdens, the employer can escape liability only by bringing itself within one of the four exceptions, the one that is particularly relevant here being the general escape clause, "a differential based on any other factor other than sex." On this the employer has the burden. *Shultz* v. *Wheaton Glass Co.*, *supra*, 421 F.2d at 266; *Shultz* v. *American Can Co.*, *supra*, 424 F.2d at 362.

Corning's most basic contention—one which, if sustained, would immediately end the case—is that work on a steady night shift is not performed under "working conditions" similar to work on day or afternoon shifts. To those uninitiated in the language of industrial relations, that would indeed seem to be true, and the District Court for the Middle District of Pennsylvania has so held, see note 7 *supra*. But, as said in one of Mr. Justice Frankfurter's early opinions, "[t]he recognized practices of an industry give life to the dead words of a statute dealing with it." *United States* v. *Maher*, 307 U.S. 148, 155 (1939). Statutory language addressed to experts must be read in the way the experts would understand it. See *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 326-27 (1951) (Frankfurter, J., dissenting).

The legislative history of the Equal Pay Act supports the construction that the time at which work is performed was not regarded as a "working condition" but rather as a proper subject for "a differential based on any other factor other than sex." The equal pay bills, H.R. 3861, 88th Cong., 1st Sess. (1963); S.910, 88th Cong., 1st Sess. (1963), as originally introduced in Congress, would have required equal pay for "equal work on jobs the performance of which requires equal skills." Ezra G. Hester, then Corning's Director of Industrial Relations Research, testified before both House and Senate Committees in opposition to this formulation. He pointed out that most of industry was by then using formal job evaluation systems in order to establish equitable wage structures in their plants, and that most of these job classification systems considered three factors in addition to "skill," to wit, ef-

fort, responsibility, and working conditions. As an example, he cited his own company's plan, which was introduced into the record. Under "working conditions" the plan and the accompanying job evaluation sheets listed two factors: "surroundings" (requiring evaluation of exposure to elements, intensity, and frequency) and "hazards" (requiring evaluation of frequency of exposure to hazard, frequency of injury, and seriousness of injury); nothing was said about time of day worked or differences in shift.[8] Mr. Hester testified that "Other companies use similar job evaluation sheets," and urged the committees to amend the proposed legislation to conform to these industry practices. See *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 1st Sess. 232-40 (1963); *Hearings on S.882 and S.910 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 96-104 (1963).

In response to this, the bill was rewritten in committee and placed in its present form. Five House Committee members thus explained the change, H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963):

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[8] Edward W. Noble, Corning's Manager of Job Evaluation, testifying in this case, gave a similar description of Corning's job evaluation plan and said specifically that the time of day was not considered to be a "working condition." See also the Dictionary of Occupational Titles (3d ed. 1965), published by the Manpower Administration of the Department of Labor. Volume II: Occupational Classification, at 656, defines working conditions as "the physical surroundings of a worker in a specific job," and gives the following examples: inside work v. outside work, exposure to heat, cold, wetness, humidity, noise vibration, hazards (risk of bodily injury), fumes, odors, toxic conditions, dust and poor ventilation. It does not mention night work.

> The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

Earlier in the report, at p. 3, the Committee had indicated where it thought shift differentials would fit into the statute:

> Three specific exceptions and one broad general exception are also listed. . . . As it is impossible to list each and every exception, the broad general exclusion ["differentials based on any other factor other than sex"] has also been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded.

This persuasive explanation of how the bill took shape, and the evident understanding of the Committee, consistent with this explanation, of the structure of the amended bill, outweigh the point, strongly pressed by Corning, that Representative Goodell, who introduced the bill and had a hand in redrafting it, remarked during the course of an explanation of its provisions that "hours of work, difference in shift . . . would logically fall within the working condition factor." 109 Cong. Rec. 9209 (1963). Corning also relies upon a statement by Representative Thompson, chairman of the Subcommittee:

> Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be exempted under this act.

109 Cong. Rec. 9196. But this does not assist Corning; indeed, since it is apparent that Representative Thompson was only paraphrasing his Committee's Report, this rather supports the construction that time of day differentials were covered under the catch-all exception rather than by the term "working conditions."

Administrative interpretation by the Wage and Hour Administrator, which the Supreme Court has held entitled to deference, *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), further indicates that shift differentials are to be considered a legitimate exception to the Act rather than to reflect a difference in working conditions which would make the statute inapplicable. 29 C.F.R. §§ 800.100 *et seq.* set out the Administrator's interpretations of each of the provisions of the Equal Pay Act and each of the terms used in the Act. Under "similar working conditions," § 800.132 says that "[g]enerally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions," which in itself would seem to indicate that shift differences are not considered different working conditions since this is such a common situation. The only examples given of different working conditions are the salesman who works in a store as compared with the salesman who sells door to door, or one who does repair work in a shop as compared with one who does repair work in customers' homes. In contrast, the Administrator recognizes the legitimacy of night shift differentials in § 800.145, under "Exceptions to Equal Pay Standard."

Finally, while the case law is not conclusive, the decisions, other than the recent one between the same parties

in the Middle District of Pennsylvania, see note 7 *supra*, are more favorable to the Secretary's position on this issue than to Corning's. See *Shultz* v. *American Can Co., supra*, 424 F.2d 356; *Hodgson* v. *Miller Brewing Co., supra*, 457 F.2d at 224-25 & n.8; *Wirtz* v. *Basic Inc.*, 256 F. Supp. 786 (D. Nev. 1966).

Corning's impressive evidence that night work not only is less attractive than day work but often causes physical and emotional problems thus does not carry the day. While the statute indeed permits all this to be taken into account, it is relevant under the catch-all exception, with its requirement that the employer establish that the differential was based on a factor other than sex, rather than making night work a different "working condition" and eliminating application of the statute altogether. Thus the question is whether the higher rate paid by Corning for night inspection work, until 1966 performed solely by males, was in fact intended as compensation for night work or constituted an added payment based in part upon sex.

A number of facts support the district court's conclusion that the latter was the situation here. As the history set out above indicates, the higher night rate was in large part the product of the generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks. The wage differential has never been regarded as compensation for night work. There was no evidence that any other night employees received higher pay than corresponding day workers until the plant-wide night differential was

superimposed on the basic rates in 1944;[9] since that time, it is apparent that the shift differential has been thought to compensate, fairly and adequately, employees other than inspectors for night work. Indeed, Corning had separate male and female salary schedules until June 11, 1964.

The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed. A higher rate paid to men for performing low paid "female work" is not transformed into a permissible "differential based on any other factor other than sex" simply because the men work at night. We might, of course, have a different problem if New York had continued to prohibit the employment of women at night, but the prohibition had ended a decade before enactment of the Equal Pay Act, and there is nothing to indicate that Corning would have had any more difficulty in obtaining the Industrial Commissioner's approval in 1964 than it did in 1966.

The only other basis advanced by Corning to challenge the district court's finding that it initially violated the Act is its contention that the day and night shift inspection jobs were not "equal work . . . the performance of which requires equal skill, effort, and responsibility" because some of the men on the night shift had to do their own "utility work," involving a certain amount of packing and

[9] The first night shift differential was only five cents per hour; the excess in the base rates paid the men working as inspectors on the night shift over that paid the women on the day shift was at that time on the order of fourteen cents per hour.

lifting the inspected articles and cleaning up around the inspection station, which, on the day shifts, was primarily performed by male helpers especially hired for such work. It is now well settled, however, that the jobs under analysis need not be identical in every respect before the Equal Pay Act is applicable; inconsequential differences can be disregarded as long as the jobs are "substantially equal." *Shultz* v. *Wheaton Glass Co., supra,* 421 F.2d at 265; *Shultz* v. *American Can Co., supra,* 424 F.2d at 360; *Hodgson* v. *Fairmont Supply Co.,* 454 F.2d 490, 493 (4 Cir. 1972). Applying this standard, the district court rejected Corning's contention primarily on the ground that Corning's job evaluation plan "considered the utility work of so little consequence that these tasks were not included in the job descriptions of any of the inspectors."[10] 319 F. Supp. at 1169. As the court below noted, *id.*, these job descriptions, prepared through observation of actual job performance in 1963 and 1964, are particularly significant here since they demonstrate Corning's own view of the content of the jobs before its perspective was changed by

[10] Corning objects to the use made by the district court of the descriptions of the inspection jobs prepared for the Corning Glass Works Job Evaluation Plan (CGW Plan) and, to a lesser degree, of those contained in an earlier plan prepared for Corning by Stevenson, Jordan & Harrison (SJ&H Plan). Insofar as the objection rests on the hearsay rule, it is answered not only by the business records statute, 28 U.S.C. § 1732(a), but by the status of these plans as admissions (in the case of the SJ&H plan, an adoptive admission). Insofar as the objection rests on the point that application of the Equal Pay Act hinges on actual job content rather than the employer's evaluation, see *Hodgson* v. *Brookhaven Gen'l Hosp., supra,* 436 F.2d at 724, the evaluation is nonetheless evidence, and often exceedingly good evidence, of the actuality; if either party seeks to show the contrary, it is open to him to do so. The job descriptions, together with the supporting testimony of Edward Noble, were sufficient to sustain the Secretary's burden of proof on job equality.

the filing of this litigation. Other evidence also showed the inconsequentiality of this factor. Although some male inspectors on the night shift had at times been given the assistance of utility workers, Corning has always continued to pay all night inspectors at the same wage. Indeed, Corning's Manager of Job Evaluation, Edward Noble, conceded that "there is very little difference from shift to shift" in the performance of these inspection jobs. There is ample support for the district court's conclusion that the relevant jobs entail "substantially equal" work. Cf. *Shultz* v. *American Can Co.*, *supra*, 424 F.2d at 360-61.

We thus approve the district court's holding that when the Equal Pay Act took effect, Corning was violating it by paying higher base wages to the male night inspectors, and proceed to consider whether the violation has since been cured.

III.

Corning first contends that it cured its violation by opening the night shift to women in 1966 on what was clearly more than a token basis, but see note 6 *supra*. Although this argument seems persuasive at first blush, it must be rejected. Congress was quite specific how the injustice of unequal pay for equal work must be eradicated. Recognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor, see, *e.g.*, *Hearings on H.R. 3861*, *supra*, at 8 (statement of Secretary of Labor Wirtz), Congress declared that wage discrimination on the basis of sex "depresses wages and

living standards" of the many families dependent on the income of women. Equal Pay Act § 2, 77 Stat. 56. Consequently it provided that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of the women. This intention, clearly enough expressed in the proviso of 29 U. S. C. § 206(d)(1), that "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee," received express emphasis from the legislators. "The only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher." *Hearings on H.R. 3861 supra*, at 65 (statement of Representative Griffin); see also H.R. Rep. No. 309, *supra*, at 3 ("The lower wage rate must be increased to the level of the higher.")

In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration; in effect, Corning was still taking advantage of the availability of female labor to fill its day shift at a differentially low wage rate not justified by any factor other than sex. We thus join with every other court of appeals which has considered the issue in holding that merely opening the higher paid jobs to women as vacancies arise is not sufficient to comply with the requirements of the Equal Pay Act. *Schultz* v.

American Can Co., supra, 424 F.2d at 359; *Hodgson* v. *Square D Co.,* 459 F.2d 805, 808-09 (6 Cir. 1972), *cert. denied,* 41 U.S.L.W. 3230 (Oct. 24, 1972); see also *Hodgson* v. *Miller Brewing Co., supra,* 457 F.2d at 226-27.

We come finally to Corning's contention that any violation was cured by the new collective bargaining agreement which became effective January 20, 1969. As previously indicated, this would clearly have been so if Corning had simply established a uniform day and night shift rate at least as high as the previous night shift rate, either with or without a plant-wide night differential. The problem stems from the "red circle" rate whereby any employee hired before January 20, 1969, receives a basic rate for night shift work some four to twelve cents per hour higher than for the day and afternoon shifts. Corning's contention that this is a differential based on seniority, another permitted exception, is belied by the fact that it is paid only for work on the night shift. We cannot disagree with the district judge, *Hodgson* v. *Corning Glass Works,* 330 F. Supp. 46, 50 (W.D. N.Y. 1971), that, on the facts of this case, "the 'red circle' rate paid to night shift inspectors perpetuates the discrimination of the 'supplemental escalating shift differential'"—the euphemism Corning has coined for the excess base wage rates paid to inspectors on the night shift.

We do not minimize the problems faced by Corning in changing policies originally resulting from New York law so that it will comply with the Equal Pay Act. It may well be that the wages originally paid the male inspectors on the steady night shift were more than the jobs were

worth and were paid only because Corning could not get the men to do this work for less than they were receiving for labor requiring more skill or effort. With the benefit of hindsight, Corning could have avoided this suit—and its back pay liability—by opening the night shift to women once the New York law was changed in 1953, when there was no legal obstacle to reducing the night rate, or, perhaps more realistically in light of union pressures, holding the night rate and gradually increasing the day rate until the two met, as was finally done, save for the "red circle" provision, in 1969. Even with the passage of the Act, however, Corning had ample time to restructure its wage rates to comply with the Act's provisions, for Congress postponed its effectiveness for one year, see Equal Pay Act § 4, 77 Stat. 57, in order to avoid the "severe hardship" immediate compliance might impose on employers. See S. Rep. No. 176, 88th Cong., 1st Sess. 5 (1963). But it did not do so, and upon the effectiveness of the Act, many of Corning's options were foreclosed by the proviso previously discussed. If the result here seems harsh in view of the efforts Corning has been making since 1966, the harshness is that which may be inevitable when a legislature demands a drastic change in discriminatory practices that had too long been accepted.

IV.

Not content with requiring the payment of back wages which, with interest, will exceed $600,000,[11] the district court issued a sweeping injunction, broadly incorporating

[11] Corning also challenges the district court's calculation of the amount of back pay due. We see no merit in this contention.

the words of the Act and applicable to all Corning plants (save that in Wellsboro, Pennsylvania), which we quote in the margin.[12]

We see no justification for this. Corning had been found to have violated the Equal Pay Act only with respect to one class of employee at its three plants in Corning, New York. As indicated, the violations were largely a result of the New York law which until 1953 had prohibited the employment of women at night. The Secretary's case was by no means impregnable, and Corning had been endeavoring since 1966—sincerely, if ineffectively—to bring itself into compliance. There was no evidence of widespread violations of the Act, either at the Corning plants or its 26 branch plants nationwide. The evidence rather was that the only other cases where a similar violation might exist were the inspection jobs in the plant at Wellsboro, Pennsylvania, which was excepted from the injunction because of a pending suit by the Secretary, and in a plant at Central

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[12] (1) The defendant shall not, contrary to section 6(d)(1) of the Act, discriminate on the basis of sex between employees employed within an establishment by paying wages to employees in such establishment at a rate less than the rate at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions:

(2) The defendant shall not, contrary to section 6(d)(1) of the Act, reduce the wage rate of any employee in order to comply with the provisions of section 6(d)(1) of the Act:

(3) The defendant shall not, contrary to section 15(a)(1) of the Act, transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any of its employees has hereafter been employed in violation of section 6(d)(1) of the Act:

(4) Defendants shall cease to withhold any amounts owing to any employee which have been withheld in violation of section 6(d)(1) of the Act.

Falls, Rhode Island, as to which the Secretary had also already instituted suit. Yet so broad an injunction put Corning under threat of contempt for any alleged violation of the Equal Pay Act in respect of any category of employee in all but one of Corning's many plants.

We agree with the point made by the Eighth Circuit, in another Equal Pay Act case, *Hodgson* v. *American Can Co.*, 440 F.2d 916, 921 (1972), that absent a showing of a policy of discrimination which extends beyond the plants at issue here, there is no basis for a nationwide injunction. Moreover, the Supreme Court has held that

> the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus to subject the defendant to contempt proceedings if he should at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

NLRB v. *Express Publishing Co.*, 312 U.S. 426, 435-36 (1941). Since there is no showing here of the "proclivity for unlawful conduct" or "record of continuing and persistent violations of the Act" found to justify such an injunction in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949), the junction must be narrowed accordingly. While *Hodgson* v. *First Fed. Savings & Loan Ass'n*, 455 F.2d 818, 825-27 (5 Cir. 1972), relied on by the Secretary, may have been correctly decided on its own facts, we cannot subscribe, in the light of *Express Publishing* and our own views, to all that was there said.

The injunction is modified by eliminating paragraph (3) and limiting the remaining paragraphs to inspectors at the three Corning plants. As so modified, the judgment is affirmed. No costs.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,
Defendant.

Civil 1967-29.

Appearances:

Francis V. LaRuffa, Chief Trial Attorney, and Mrs. Isabelle R. Cappello, Deputy Counsel for Regional Litigation, United States Department of Labor, Attorneys for the Plaintiff.

Reed, Smith, Shaw & McClay (John G. Wayman and Scott F. Zimmerman, of Counsel), Pittsburgh, Pennsylvania, for the Defendant.

The Secretary of Labor commenced this action under the provisions of Section 17 of the Fair Labor Standards Act (29 U.S.C. § 217) to enjoin violations of Section 6(d) [29 U.S.C. § 206(d)] of the Act, and to restrain any withholding of payment of wages found by the court to be due to employees under the Act.

The plaintiff, George P. Shultz, Secretary of Labor, sues on behalf of all Class C, Class B, TV, and General TV inspectors working during periods pertinent in this lawsuit. Class B inspectors and Class C inspectors perform their functions in A Factory and in B & C Factory [also referred to herein as B Factory]. TV inspectors and General TV inspectors function in the Pressware plant.

This dispute arose because of the higher base wage rates paid to inspectors working the steady night shift who allegedly perform work equal to that performed by inspectors on the day and afternoon shifts. Prior to June 1, 1966, except during World War II, only female inspectors worked in the disputed jobs on the day and afternoon shifts, and only male inspectors worked on the steady night shift.

The defendant's employees represented by the plaintiff include both male and female inspectors in the various job categories. Those male inspectors who did inspection work on the day and afternoon shifts after June 11, 1964, the effective date of the Equal Pay Act, are damaged monetarily if the violation charged is proven because, absent a violation, the base rate for the day and afternoon shifts would equal the higher base rate paid at night.

Section 6(d), commonly known as the Equal Pay Act, was enacted on June 10, 1963, to be effective one year thereafter. Section 6(d)(1) provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed,

between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

To carry its burden of proof, the plaintiff must establish by a fair preponderance of the evidence these elements:

(1) The disputed jobs entail equal work, that is, the performance of these jobs, under similar working conditions, require equal skill, effort, and responsibility;

(2) Within the same establishment, the defendant pays employees doing equal work a different wage rate;

(3) The different wage rates are paid on account of sex.

The four exceptions to the Act have been held to be affirmative defenses which must be pleaded and proven by a defendant-employer. *Wirtz* v. *Basic, Inc.,* 256 F. Supp. 786 (D. Nev. 1966). Finally, an employer may not decrease any employee's pay rate to come in conformity with the Act.

In its original answer, the defendant denied that the work performed by the men and women involved in this lawsuit was equal. After the trial, the defendant moved, pursuant to Rule 15 of the Federal Rules of Civil Procedure, for an order permitting it to amend its answer to conform to the evidence. The proposed amendments are: (1) "The payments made to steady night shift inspectors were and are based upon a factor other than sex;" (2) "To the extent that the complaint states a claim prior to November 1, 1964, it is barred by the statute of limitations." Defendant's motion to amend its answer is granted.

At the beginning of the trial, the parties stipulated that the statute of limitations barred all claims arising prior to November 1, 1964. Accordingly, any award for back pay should be computed commencing on November 1, 1964.

The court has considered the extensive memoranda of law submitted by the parties. What follows constitutes this court's findings of fact and conclusions of law.

Establishment

All three plants are separate, making different products. A Factory is engaged primarily in the production of pyrex products, B & C Factory in the production of optical products, and the Pressware plant in the production of television products.

A Factory and B & C Factory share an office building, are located back to back, and are connected by passageways. The Pressware plant is about one-half mile away from the other two.

Each plant is an independent manufacturing unit, having its own management and engineering staff and a separate payroll department.

A central employment office where all prospective employees make their original applications services all Corning area plants. As a particular plant needs new workers, a final pre-employment interview is conducted at the separate personnel office of the plant, where the decision is made to accept or reject the applicant for employment. After employment, an employee, by exercising his seniority rights, may transfer from one plant to another. However, a transfer from A Factory or B Factory to Pressware, or back to A Factory or B Factory from Pressware, is unusual since Class C and Class B inspectors work only in A Factory or B Factory, and TV and General TV inspectors work only in the Pressware plant.

Most employees at Corning, including the inspectors, are represented by the American Flint Glass Workers of North America, Local 1000. One collective bargaining agreement covers all Corning area plants. All payroll checks are written on a computer on information supplied by each plant.

The court finds that A Factory and B & C Factory constitute one establishment, and that the Pressware plant constitutes a separate establishment within the meaning of the Equal Pay Act. The reasons for this holding are that Pressware is separated from the other two plants, and because the inspectors do not transfer back and forth between the Pressware plant and the other two plants. *Phillips* v. *Walling*, 324 U.S. 490 (1944); *Mitchell* v. *Bekins Van & Storage Company*, 325 U.S. 1027 (1957), 29 CFR 800.108.

History

Steady night shift inspection jobs were added to existing rotating day and afternoon shift inspection jobs some time between 1925 and 1930, when the introduction of automatic production equipment made it necessary to inspect wares on three shifts. At that time, New York State law prohibited the employment of women between the hours of 10:00 P.M. and 6:00 A.M.[1] The defendant did not pay additional wages in 1930 as a shift differential. However, in order to obtain male employees willing to perform what was regarded by the male employees as female work, the defendant had to pay the male employees a higher rate than it paid female employees who performed inspection work on the day and afternoon shifts. This higher base rate for steady night work was never paid for inspection work on the day and afternoon shifts until January 20, 1969, when the company and the union agreed to equalize base rates on all three shifts with payments retroactive to November, 1968.

Beginning in the early 30's, some inspectors at some stations on the steady night shift performed their own "utility work" which entailed, among other things, carrying heavy loads from the end of the lehr. Similar work on the day and afternoon shifts was performed by utility workers assigned to assist the female inspectors.

Because of manpower shortages during World War II, the defendant employed some women as steady night shift inspectors. These female night inspectors performed their own utility work, including the moving of boxes, the trucking away of ware and the positioning of skids and boxes adjacent to the inspection area. They received a higher

rate of pay than the day and afternoon inspectors and the same rate paid to male night inspectors, if and when they performed all the work ordinarily required of a male night inspector.

After World War II, Corning returned to the prior practice of employing only males in the steady third shift inspection jobs.

In 1944, the American Flint Glass Workers Union of North America negotiated a collective bargaining agreement covering many production and maintenance employees of the defendant's plants located in Corning, New York. This contract covered the inspectors employed at A Factory, B & C Factory, and the Pressware plants, and it provided for a steady night shift wage differential as a premium for night work. This differential was applicable to inspectors as well as most other hourly employees of the defendant.

In addition to the steady night shift wage differential, this contract continued in effect the existing differential in base wage rate between the steady night shift inspectors and the rotating day and afternoon shift inspectors. Between the years 1944 and 1968, all collective bargaining agreements entered into by the defendant with the union have maintained similar wage differential structures with minor variations caused by negotiation of percentage rather than flat rate increases.

In 1953, New York State law was amended to provide, for the first time, that females over twenty-one years of age could work after midnight in factories operating multiple shifts, where the Industrial Commissioner found that satisfactory conditions exist and granted his approval.[2]

Similar provisions of the law have remained in effect during all times pertinent in this lawsuit.[3]

There is no evidence offered by either side that the Industrial Commissioner ever granted permission to the defendant to employ females on the steady night shift prior to June 1, 1966. From the fact that women actually worked the night shift inspection jobs after June 1, 1966, the court infers that the defendant obtained the necessary permission from the Industrial Commissioner. Further, the defendant has failed to offer any explanation of what, if any, efforts were made to obtain this permission at an earlier date.

Merger of Rate Schedules

Prior to June 11, 1964, the defendant maintained separate "male" and "female" rate schedules. Under these separate rate schedules, male inspectors working the steady night shift were paid a higher hourly base rate than the rotating day and afternoon female inspectors who were in the same job category, performing work rated substantially equal by defendant's own job evaluation plans.

Effective June 11, 1964, the defendant merged these separate schedules into one revised rate schedule. This merger, however, preserved the differential in base rate between the men and the women inspectors on all three shifts. This difference was preserved by placing the women into a lower labor grade on the revised rate schedule with a lower rate of pay.

A comparison of the separate schedules and the single revised schedule illustrates how the difference was maintained.

The female rate schedule dated November 19, 1962 indicates that a Class C female inspector was in group 3 (*i.e.*, the wage group of female employees whose jobs were evaluated between 215 and 235) and was paid $1.89 to $1.97-½. On the merged rate schedule, Class C female inspectors were classified as "new group" 1, and their rate of pay was $1.97-½.

The *male* rate schedule dated November 19, 1962 indicates that a Class C male inspector, working nights, was classified in wage group 2 (*i.e.*, that group of male employees whose jobs were evaluated between 165 and 235) and was paid $1.99 to $2.13-½. On the merged rate schedule, the former male rates were maintained by placing the Class C male inspector in "new group" 5, with rate range of $2.01-½ to $2.13-½.

The Class B inspectors and the General TV inspectors, male and female, were affected similarly by the merger of the rate schedules.

Therefore, the merger continued the historical difference in base hourly rates of the men and women inspectors working the three shifts. In the case of Class C and TV inspectors, the base rate differential between men and women inspectors was 16¢ an hour. For Class B and General TV inspectors, the hourly differential was 18¢. In the years after June 11, 1964, the hourly base rate differential was gradually increased.

Seniority Lists

Before June 1, 1966, defendant had maintained separate "male" and "female" seniority lists. In effect, these separate lists made it impossible for a female inspector to transfer into a steady night-time traditionally male inspection job.

Effective July, 1965, the Civil Rights Act mandated equal employment opportunities without regard to an employee's sex.[4] On May 31, 1966, the defendant abandoned its separate seniority lists, thus affording female inspectors an opportunity to take higher paid night shift inspection jobs as they became available. After June 1, 1966, a number of female employees availed themselves of the opportunity to use seniority to take the higher paying night shift inspection jobs. Of course, they also received the Corning-wide night-time differential provided by the collective bargaining agreement. Also since June, 1966, some men inspectors have taken day and afternoon inspection jobs with the reduced base hourly wage rate. This abandonment of the separate seniority lists was accomplished by mutual agreement between the union and defendant.

Equality of Work-Job Evaluation Plans: Admissibility and Analysis

In attempting to meet its burden of proving the equality of the disputed inspection jobs on all three shifts, the plaintiff has relied heavily on two job evaluation studies conducted by the defendant. These evaluation studies rate the disputed work equal on all three shifts.

In a pretrial statement analyzing the plaintiff's proposed exhibits and giving reasons for objections, which the court required the defendant to submit, no objection was made to Exhibits 34 to 41, and Exhibits 42 to 46 were objected to only on the grounds of relevancy and materiality. During the trial, the defendant objected only on the grounds of relevancy and materiality to the admission of plaintiff's Exhibits 34 to 46. In its post-trial memorandum, defendant for the first time raises additional objections to these exhibits, claiming that the records are hearsay, that they are not business records kept in the regular course of business, and that a proper foundation was not laid for their admissibility.

Since these grounds were not asserted definitely during the trial, the defendant has waived its right to object on these grounds. 2B Barron & Holtzhoff, Federal Practice and Procedure, § 1021, at pp. 309-319 (C.A. Wright rev. 1961). If the defendant's objection had been made clear at the time of trial, the plaintiff would have had an opportunity to clear up any deficiency which was present in the offer.

Furthermore, the purpose of Title 28, United States Code, Section 1732, the Federal Business Records Act, "is to permit the introduction into evidence of reports in substitution for the actual testimony in court of the persons making the reports." *United States* v. *New York Foreign Trade Zone Operators,* 304 F.2d 792 (2d Cir. 1962). "The statute was designed to bring the realities of business and professional practice into court in usable form . . ." *Korte* v. *New York, N. H. & H. R. R.,* 191 F.2d 86, 91 (2d Cir. 1951).

The records admitted were made and kept in the regular course of business of the defendant by trained observers following guidelines published by the defendant after a careful study had been made of the problems involved in evaluating the jobs. The job descriptions and evaluations were regularly used by the defendant in the course of its business and they were all prepared before the present litigation began.

Considering the purpose of the Federal Business Records Act, the reliability of these records was well established. Thus, defendant's objections to the admission of these exhibits is overruled.

It is necessary for the court to examine these studies to determine if the plaintiff has met its burden of proving equality of work.

The Stevenson, Jordan & Harrison Job Evaluation Plan [hereinafter referred to as the SJ&H Plan] was installed in 1946 and, according to the defendant, remained in effect until January 20, 1969. This evaluation plan measured skill, responsibility, and working conditions in evaluating the work performed in different job classifications. The defendant claims it was deficient since it did not take into account the amount of effort required in the performance of the jobs, or the time of the day the work was performed.

Further, defendant claims that the SJ&H Plan was never used to set wage rates because all base wage rates, including the separate male and female wage curves and the merged base rates, were the result of negotiation between the company and the union. In sum, the defendant contends, a higher base rate was negotiated for the male

inspectors on the steady night shift, in spite of the fact that the SJ&H Plan evaluated the work done under the same inspection classification equal on all three shifts.

The court is in accord with defendant's position that plaintiff cannot satisfy its burden of proof by relying on the descriptions used and the evaluation points determined in the SJ&H Plan. The Equal Pay Act requires that, for jobs to be equal, their performance must require "equal skill, effort, and responsibility," and must be performed "under similar working conditions, . . ." The SJ&H Plan did not measure effort. Therefore, the descriptions and evaluations prepared under this plan are insufficient alone to satisfy plaintiff's burden of proving the equality of the work.

The plaintiff also relies upon the Corning Glass Works Job Evaluation Plan [hereinafter referred to as CGW Plan], and the descriptions of the jobs made under this plan to satisfy its burden of proof.

The CGW Plan was developed over the years commencing in 1957. The CGW Evaluation Manual states that the purpose of the plan was "to establish equitable differences in pay between jobs based on job requirements, and further explains that "through the use of this system, equitable relationships will be established in terms of job evaluation points. When these points are applied to local wage curves, they will establish the rate range for any given job at that location." The CGW Plan measured effort, skill, responsibility, and working conditions. Like the SJ&H Plan, the CGW Plan does not take into account the time of day a particular job is performed.

The CGW Plan was first installed to establish wages in a branch plant in 1960 and, since that time, it has been installed at 24 branch plants. There was discussion between the company and the union in 1962 concerning its use at Corning. According to the defendant, this offer to use the plan in Corning was rejected by the union in 1962 and on five subsequent occasions. The reasons for the rejection by the union are unknown to the court. Nevertheless, in January, 1969, Corning and the union agreed that the CGW Plan would be the official job evaluation plan at Corning, with rates effective November, 1968.

Although the plan was not in effect until the latter part of 1968, the Industrial Engineering Department at Corning prepared descriptions of several of the jobs in question in this lawsuit and evaluated each of them in accordance with the CGW Plan during 1963 and early 1964. Under this plan, the work in most of the job classifications disputed in this lawsuit was evaluated as equal on all three shifts.

Defendant argues that plaintiff's use of the CGW Plan evaluation points and job descriptions also fails to satisfy plaintiff's burden of proof. It is defendant's claim that the job descriptions under this plan describe what an inspector is supposed to do, but do not actually describe the work he actually performs. Further, defendant argues that the CGW description and evaluation points are irrelevant prior to January, 1969 when the plan went into effect.

The testimony during the trial and the procedures set forth in the CGW "Guide for Describing And Evaluating" indicate that the first step in the evaluation procedure is an on-the-job observation of the work actually being per-

formed in a certain job classification. Job analysts, together with the employees actually performing the work and their superiors, collaborate in describing the work actually performed. Once this job description is finally drafted, it serves as the basis for job evaluation.

Under this plan, plant supervisors are responsible to report to the job analysts any significant changes in the work actually performed which might affect the originally drafted job description. Obviously, this requirement insures that job descriptions and the resulting job evaluations will be kept as current as possible and reflect the work that is actually being done within a job classification.

The court notes that no CGW job description of TV inspectors in Pressware was admitted in evidence. Further, the product line in Pressware changed in late 1968 resulting in a change in the CGW job descriptions that had been prepared for this plant (*i.e.*, General TV Inspector). Mr. Edward Noble, Manager of Job Evaluation at Corning, testified that the CGW description had been revised, but that this particular job still required equal work on all three shifts.

The defendant also argues that plaintiff may not rely on the CGW job descriptions to show that the jobs in question are equal under the Act, since the descriptions do not reflect the fact that some male inspectors on the night shift do their own utility work, while some female inspectors on the rotating day and afternoon shifts are assisted by utility workers. Utility workers move in-

spected material off the lehr, clean up around the inspection stations, pack ware and move it from the inspection area. They are required to exert more manual effort than the inspectors, but their jobs are evaluated at points lower than the inspectors in visual effort, skill, and responsibility.

Specifically, during the years 1964 to 1968, utility workers were assigned to help female day and afternoon inspectors in B Factory when Flameware was being manufactured. Flameware is a pyrex product which is manufactured from 12 to 20 weeks a year. During the years from November, 1964 to June, 1968, 120 female day and afternoon Class C and Class B inspectors worked in B Factory on Flameware. During these same years, as many as 10 and as few as 4 men had been assigned to perform this utility work during a particular year.

The analyst was instructed under the CGW Evaluation Manual to "cover the work normally performed on a regular basis and those duties which require special skills but are performed only occasionally." The analyst was further instructed that "it is not necessary for the description to include every task performed in the past or likely to be performed in the future."

The performance of utility tasks by some inspectors does not make the jobs unequal. In describing and evaluating the inspection jobs, defendant's analysts considered the untility work of so little consequence that these tasks were not included in the job descriptions of any of the inspectors. For each job classified, the job descriptions are the same on all shifts regardless of whether the work is performed by men or women. Since June 1, 1966,

women have been permitted to work on the steady night shift at the same wage rate as the male night inspectors. The conclusion that utility work by inspectors was incidental or "performed only occasionally" is borne out by the fact that defendant has always paid male steady night inspectors at the same rate, whether they performed utility work or not.

Because of these facts, the court concludes that the defendant over-emphasized the role of utility workers in assisting the women during the day and afternoon shifts, and put too much emphasis on the extra work done by the male inspectors during the night shift.

Furthermore, there is other evidence in the case to show the equality of the work. Although he qualified his testimony, Edward W. Noble, manager of job evaluation for the defendant, testified: "There is very little difference from shift to shift," in describing the jobs in question. He did not know what each and every individual did, but he was familiar with the jobs from occasional personal observation and from reports made by job analysts and plant managers who were instructed to report any significant job changes.

The court is satisfied that the most accurate description of what the inspectors actually did is provided by the thoughtful description of the job analyst made under the supervision of the job evaluation manager, in cooperation with the employee himself and his plant manager. Another reason for their reliability is that these studies were made before there was any hint of litigation.

To hear testimony from a fair sampling of the employees occupying all the disputed jobs on all shifts during the relevant time period would have consumed, in the court's best estimate, many trial days. And there is no reason to believe that the descriptions which the court could have interpolated from all this testimony would reflect the work actually done in any better fashion than the job descriptions drafted under the CGW Plan.

The defendant also argues that the CGW job evaluation is unreliable under Equal Pay Act standards because the time of day the work is performed is not considered in determining the relative similarity in working conditions. However, the defendant pays a Corning-wide differential for night work. In *Wirtz* v. *Dennison Manufacturing Co.*, 265 F.Supp. 787, fn.1 (D.Mass. 1967), the court said that "this element (working less desirable night shift) appears to have been taken care of by the fact that the men received an additional allowance over and above the basic rate under the company's regularly established differential for night work." This court is in accord that a differential such as the Corning-wide night differential adequately compensates employees for working undesirable times of day and, therefore, rejects the defendant's contention in this respect.

Finally, in a case brought under the overtime provisions of the Fair Labor Standards Act, the Supreme Court pointed out that "the employer . . . is in [a] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Anderson* v. *Mt. Clemons Pottery Co.*, 328 U.S. 680, 687 (1946). Here as in *Anderson*, the defendant is in the best position to

offer evidence and to explain why the results of its own job evaluation study should not be considered in determining the equality of work on all three shifts. The court concludes that the defendant has failed to offer any persuasive reason why the CGW descriptions and evaluation points should not be relied upon by the court.

Therefore, on all the testimony and exhibits before the court, the court concludes that the CGW job descriptions used for the jobs disputed in this lawsuit reflect the work that is actually being done within the meaning of the Equal Pay Act and the regulations promulgated thereunder. As a result of this, the court further concludes that the evaluation points assigned to the jobs disputed in this case are a valid reflection of the equality of the work performed.

Therefore, the court concludes that the work performed by the inspectors involved in this lawsuit and evaluated under the CGW Plan is equal on all three shifts and has been so since November, 1964, within the meaning of the provisions of the Equal Pay Act.

Affirmative Defense

The defendant, as one of its affirmative defenses, claims that the higher base rate paid steady night shift inspectors is "a differential based on any other factor other than sex." The defendant traces the history of the higher base rate on the steady night shift from its creation in 1930 to its final elimination in January, 1969. The circumstances causing the creation and perpetuation of the higher rate until 1969, the defendant argues, explains that the higher rate was a result of a "factor other than sex."

The creation of the night shift inspection jobs was brought about by the advent of automation in the glass manufacturing business. Inspection work had to be done on all three shifts.

In 1930, women had filled most, if not all, of the inspection jobs on the day and afternoon shifts. New York law did not permit women to occupy night shift jobs. As the defendant explains it, men were less than enthusiastic in accepting steady night shift inspection work which they regarded as "women's work."

In addition, the men who were to fill the newly created night inspection positions had been working in the blowing room where they received incentive pay. With their average incentive pay added to their regular wage, they could earn more than the company was paying for inspection work on the day and afternoon shifts.

Because of these factors, it was necessary to pay men a higher rate than women for the night inspection work.

This "differential" in base rate was continued as a result of negotiation until January, 1969, even though the first union contract in 1944 provided for a Corning-wide night shift differential. Prior to June 1, 1966, only male inspectors worked the night shift and received this differential in base rate, plus a night shift differential.

The night shift differential was originally 5¢ an hour and reached 12¢ an hour in 1958. The steady night shift differential represents compensation for the undesirable hours of this shift, which begins at 10:00 P. M., 11:00 P. M., or midnight.

For purposes of this litigation, the defendant has called the differential in hourly base pay a "supplemental escalating shift differential." This term is not used in the agreements and defendant's supervisors who testified had never heard of it and did not understand what it meant.

Citing the interaction between the company and the union, the fact that New York law prohibited night work by women for a long period of time, and the original reasons why a differential in base rate was necessary, the defendant attempts to justify the higher night shift base rate paid to men after June 11, 1964. The court, however, is not persuaded that paying a higher steady night shift rate, a "supplemental escalating shift differential," is justifiable after the effective date of the Equal Pay Act.

The Act was passed in June, 1963 to be effective with respect to defendant's employees in June, 1964. Thus, the defendant had a full year to implement compliance. As of 1953, New York State had lifted its absolute ban on night work by women. As of that year, women could have occupied night work positions if approval by the Industrial Commissioner was sought and obtained. And, although the original basis for the higher base rate on the steady night shift may have been reasonable in 1930, this higher rate could not, in the court's view, be legally maintained under circumstances in this case after the effective date of the Equal Pay Act.

Therefore, the defendant has failed to carry its burden of establishing, by a fair preponderance of the evidence, that the higher steady night shift differential was based on "any other factor other than sex."

Summary

The court concludes that the work performed by the Class C and Class B inspectors in A Factory and B Factory and the work performed by the General TV inspectors in Pressware was equal on all three shifts from November 1, 1964 until January, 1969, and that the higher base rate paid the steady night shift inspectors was maintained after June 11, 1964 on account of sex, in violation of the Equal Pay Act. The court further concludes that the effect of this violation persisted after June 1, 1966. Finally, the Court concludes that the higher base rate paid night inspectors was not based on any other factor other than sex.

At the trial, the court deferred consideration of the amount of wages allegedly due the day and afternoon inspectors involved in this case. In light of the above findings of fact and conclusions of law, the defendant is restrained from withholding the payment of wages due for the period from November 1, 1964, to November, 1968, when the inspection base rates were equalized for all three shifts by the January 20, 1969 agreement.

The "supplemental escalating shift differential" in base rate shall be the basis for computing the wages due the Class C and Class B inspectors in A and B Factories and the General TV inspectors in Pressware. There shall be no award for TV inspectors in Pressware.

The parties shall attempt to agree upon the correct amount due for each employee affected by this decision. If the parties cannot agree on the amount of the judgment within a period of sixty days, or such further time granted by order of the court, then the plaintiff shall move

on notice for an accounting by a Master to be appointed by the court.

The plaintiff may at any time renew his application for the issuance of further injunctive relief which may be equitable under the circumstances of this case. Presently, the court has refrained from issuing such further injunction because the inspection rates on all shifts have been equalized by the January 20, 1969 agreement.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: July 10, 1970.

FOOTNOTES

[1] Law of March 30, 1927, ch. 453, § 172, [1927] N.Y. Laws; Law of April 28, 1930, ch. 868, § 172 [1930] N.Y. Laws (which carried forward, without change, the prohibition against night work by females).

[2] Law of April 13, 1953, ch. 708, § 172, [1953] N.Y. Laws (which amended section 172 to allow, for the first time, night work for females upon approval by the Industrial Commissioner).

[3] During the period pertinent in this lawsuit, New York Labor Law, Section 173(3)(a)(1), effective October 1, 1963, carried forward the effect of the 1953 amendment allowing night work by females after the required approval. N.Y. Labor Law § 173(3)(a)(1) (McKinney 1965).

[4] Civil Rights Act, 42 U.S.C.A. § 2000 e-2 (1970) (statute effective one year after July 2, 1964).

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, [Successor to George P. Shultz, Resigned],

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,

Defendant.

Civil 1967-29

Appearances:

Francis V. LaRuffa, Regional Solicitor, and Isabelle R. Cappello, Assistant Counsel for Trial Litigation, United States Department of Labor, for Plaintiff.

Reed, Smith, Shaw & McClay (John G. Wayman and Scott F. Zimmerman, of Counsel) Pittsburgh, Pennsylvania, for Defendant.

Plaintiff brought this suit under the provisions of Section 17 of the Fair Labor Standards Act (29 U.S.C. § 217) to enjoin violation of Section 6(d) of the Act [29 U.S.C. § 206(d)], and to restrain the withholding of payment of wages found by the court to be due to defendant's employees under the Act.

After a trial, this court filed a decision on July 10, 1970,[1] ruling that the work of the Class C, Class B, and General TV inspectors was equal on all shifts within the meaning of the Act, that the payment of a lower rate to the day and afternoon shift inspectors was sex-based and illegal, and that men as well as women were damaged monetarily when, after June 1, 1966, men worked at the previously all-female day and afternoon inspector jobs at a reduced base hourly wage rate. During that trial, defendant described the sum paid to night shift workers which was in addition to the regular night shift differential paid to all night workers as a "supplemental escalating shift differential." The court ordered that restitution be paid in that amount to the employees affected from November 1, 1964 until the end of November, 1968. Injunctive relief after that date was denied because, at the time of filing that decision, the court was of the opinion that the rates of all inspectors had been equalized on all shifts by a collective bargaining agreement entered into between the defendant and the Union on January 4, 1969.[2]

On July 17, 1970, plaintiff promptly moved to amend the findings of the court on the ground that the inspection rates on all shifts had not been equalized by the collective bargaining agreement.[3] To determine the impact of this agreement upon the wages paid to men and women inspectors on the three shifts, further extensive interrogatories and requests for admissions were filed and answered. In addition, on May 10, 1971, the court heard further testimony. The following constitutes the court's amended and supplemental findings of fact and conclusions of law.

Plaintiff and defendant are generally in agreement about the facts, but sharply dispute the conclusion which the

court should draw from these facts. After considering the evidence presented, it is clear now that the court's prior decision that the January, 1969 agreement equalized the rate paid on all shifts to the inspection jobs after November, 1968 was in error.

During November and December, 1968, defendant and Local 1000 of the American Flint Glass Workers Union of North America negotiated a new collective bargaining agreement which was entered into on January 4, 1969. The agreement provided for certain retroactive wage boosts effective in November, 1968. The parties agreed that the Corning Glass Works Job Evaluation Plan, which the court relied upon in its original decision, would become effective on January 20, 1969.

Because the parties are not in dispute about the terms of the agreement or the wages which will be paid as a result of it, it is not necessary to detail the complicated formula used by the parties to set the rates, but, to understand the argument, it is important to summarize the results of the agreement.[4]

The Corning Glass Works Evaluation Plan rated the inspection jobs at issue in relation to the other jobs in the defendant's plant in a fair, non-discriminatory manner not based upon sex. It abolished the separate wage rates for day, afternoon, and night shift inspectors, increased the rate of all inspector jobs, day and night, so that the resulting wage was the same in all three shifts. Further provisions in the agreement, however, resulted in the payment of a higher rate at night to every person employed before January 20, 1969. Because of this "red circle" provision in the agreement, all Class C, Class B, and General

TV inspectors (until this job was discontinued in December, 1969) working on the steady night shift have continued to receive a higher base wage rate—in addition to the plantwide night shift differential—than their counterparts of comparable seniority working on the day or afternoon shifts. Men or women may work the night shift but, when they transfer to the day or afternoon shifts, they receive less pay. This "red circle" or "protected" rate will not be paid to employees hired after January 20, 1969. However, up to May 10, 1971, the date of the hearing, no one hired after January 20, 1969 had worked at one of the night inspection jobs. It will be some time before the "red circle" rate will be phased out, because there are about 500 employees currently on lay off who must be offered an inspection job before it can be offered to a new employee.

The Company claims that the "red circle" rate was needed because of a policy to protect the rate of a senior employee when his job is reclassified at a lower rate. The Company specifically referred to that section of the agreement which provides that, when "job evaluation . . . results in wage brackets lower than prevailing rates then paid for the job, it is not the intention of the Company to reduce the prevailing base rates of employees currently working on such jobs."[5] A complicated formula in the agreement put this general statement into practical effect, with the result that the night inspection job previously receiving a "supplemental escalating shift differential" now received a "red circle" or "protected" rate. The amount of the "red circle" rate is smaller than the "supplemental escalating shift differential" but the result of this plan was to continue the prior practice under another name.

In its original decision, the court ruled that, from June, 1964 continuing through June 1, 1966, when women first worked on the night inspection jobs, until November, 1968, day and afternoon inspectors were entitled to be paid the "supplemental escalating shift differential."[6]

If the day and afternoon inspectors had been paid this amount before November, 1968, in January, 1969 when the new agreement was entered into, the day and afternoon inspectors would have received the benefit of the "red circle" rate in the same way that the night shift inspectors did. To state it in another fashion, if defendant had been in compliance with the Equal Pay Act on June 11, 1964, all inspectors would have been paid at the same rate in January, 1969, and all would have received the same increase when the agreement went into effect.

Defendant insists that seniority and not sex discrimination is the reason for the extra pay. Defendant alludes to the fact that both men and women have received the "red circle" protection; that, when women who have been employed before January 20, 1969 work the night shift, they receive the "protected" rate and, when men work the day shift, they work at the reduced rate.[7] Furthermore, defendant contends that the formula for the "red circle" protection depended upon the payment made to inspectors immediately before the agreement was reached. Since both men and women worked as night inspectors from June, 1966, the defendant's argument is that the "red circle" rate is derived from a wage paid to women as well as men.[8]

However, the court has already found that the payment of the "supplemental escalating shift differential" during

the period June, 1966 to November, 1968 was sex based and a violation of the Act. The rates paid during that period were the result of a longstanding practice to pay a lower rate to female inspectors who, for many years, worked only the day or afternoon shifts.[9] During the hearing, defendant admitted that there is an historical connection between the "red circle" rate and the prior "supplemental escalating shift differential."

It is appropriate to apply the principles growing out of the cases arising under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000(a)(2)] to Equal Pay Act cases, since the purpose of both Acts is to eliminate employment discrimination. *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 266 (3d Cir.), cert. denied, 398 U. S. 905 (1970).

Assuming that the formula for payment of wages after January 20, 1969 is a neutral employment practice, one to protect the rate paid to senior employees, nevertheless, if the result of this formula perpetuates past discrimination, it will not be permitted. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), a Title VII action, at page 430, the Supreme Court said:

> "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

See also, *United States* v. *Bethlehem Steel Co.* (2d Cir.), decided June 21, 1971. In that action under Title VII of the Civil Rights Act, the court ordered rate retention for a group which had been discriminated against in employment opportunities. The court explained that it did so "so that the effects of past discrimination would not be perpetuated."

The court finds that, in this case, the "red circle" rate paid to night shift inspectors perpetuates the discrimination of the "supplemental escalating shift differential." The "red circle" rate is not a valid "red circle" rate under the Equal Pay Act. 29 C.F.R. § 800.146.

In order to eliminate the discriminatory rate paid to day and afternoon shift inspectors, the Company shall pay the "red circle" rate to them as well as to night shift inspectors. Defendant is restrained from withholding the payment of wages due for the period from November 1, 1964[10] until the date it equalizes the rate paid to the various inspectors. The basis for computing the wages due shall be equivalent to the "supplemental escalating shift differential" and the "red circle" differential, depending upon the time period involved. The parties shall attempt to agree upon the correct amount due each employee affected by this decision. If they cannot agree upon the amount of the judgment within a period of sixty days, then the plaintiff is directed to move promptly, on notice, for an accounting by a Master to be appointed by the court. At the same time, the parties are directed to attempt to agree upon the manner of distribution of the award to the employees.

In the court's original decision, the plaintiff's application for an injunction, pursuant to Section 17 of the Fair Labor Standards Act, restraining future violations of the Act was denied with leave to renew. The court is now satisfied that the plaintiff is entitled to this relief. The defendant has been in violation since June 11, 1964. Since January, 1969 when the Company entered into the new agreement, it continued to pay the past discriminatory rate. The Company admits that a similar plan for the payment of inspectors was in force in at least two other plants and,

in at least ten plants of the twenty-six, up to May, 1965 it continued to have separate male and female rate schedules. Furthermore, the present collective bargaining agreement at the Corning plant expires on January 20, 1972. Whatever new agreement is entered into, it is important that the negotiations be carried out with the understanding that future violations of the Act may be the subject of contempt proceedings.

Under these circumstances, an injunction should issue for the purpose of the Act is to "correct a continuing offense against the public interest," not simply "to collect a debt owed by an employer to an employee." *Wirtz* v. *Jones*, 340 F. 2d 901, 904 (5th Cir. 1965). The injunction merely directs what the employer is required to do by law. It places no additional burden on the Company, but it relieves the heavy burden placed upon the Department of Labor to conduct a widespread investigation of defendant's operation. See *Wirtz* v. *Harper Buffing Co.*, 280 F. Supp. 376, 382 (D. Conn. 1968), aff'd without opinion, 2d Cir. September 17, 1968, Dkt. No. 32167; *Walling* v. *Brooklyn Braid Co.*, 152 F. 2d 938 (2d Cir. 1945); and *Hodgson* v. *Ricky Fashion, Inc.*, 434 F. 2d 1261 (5th Cir. 1970).

In addition, to carry out the purpose of the Act, the injunction issued must be company-wide. Since the discriminatory practice was allowed to continue at the Corning plant, the court believes that, in other plants not under the pressure of investigation or litigation, the Company would not strenuously endeavor to correct similar discriminatory practices. *Wirtz* v. *Beneficial Finance Co. of Wisconsin*, 346 F. 2d 340 (7th Cir. 1965). The court directs that the defendant Company at Corning and at all branch plants,

except the branch plant at Wellsboro, Pennsylvania where an action has been filed and a trial is likely in the near future, its officers, employees, and those in active concert with them are enjoined from future violations of the Act.

Interest shall be paid on the amounts withheld at the rate of 6% from the median date of employment. In *Hodgson* v. *American Can Co.—Dixie Products,* 440 F. 2d 916, 922 (8th Cir. 1971), the court explained the reason for the award of interest:

> ". . . In the absence of an unequivocal prohibition of interest, and where the statute imposes a money obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties. Rodgers v. United States, 332 U. S. 371, 68 S. Ct. 5, 92 L. Ed. 3 (1947). Clearly the award of back wages under the Fair Labor Standards Act is remedial in nature. 29 U.S.C. §202(b). . . . The purpose of the award is to compensate the employees for the loss sustained because of the wrongful withholding of wages. While the good faith of the employer is one of many factors to be considered, '[t]o make such employees whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable.' . . .
>
> From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use. The interest should be allowed from the dates of the underpayment. . . ."

Similar considerations require the awarding of interest in this case.

So ordered.

JOHN T. CURTIN,
John T. Curtin,
United States District Judge.

Dated: August 3, 1971.

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[1] *Shultz* v. *Corning Glass Works*, 319 F.Supp. 1161 (W.D.N.Y. 1970).

[2] *Id.* at 1171.

[3] Since July 10, 1970, other motions were also presented to the court. On December 2, 1970, the defendant's motion pursuant to Rule 19 of the Federal Rules of Civil Procedure to add the local and international unions as defendant parties was denied. A motion by plaintiff to include TV inspectors in the award was similarly denied.

[4] Defendant pays the following rates to employees employed on or prior to January 20, 1969 who work as Class B and Class C inspectors:

BASE RATE RESULTING FROM AGREEMENT OF

	11/1/67 through 1/5/69	1/4/69 through 11/2/69	11/3/69 through 1/4/70	1/5/70 through 11/1/70	11/2/70 through 1/3/71	1/4/71 through Present
Class B, night shift	$2.575	$2.80	$2.92	$2.95	$3.07	$3.10
Class B, day and afternoon shifts	2.37	2.68	2.80	2.83	2.945	2.975
Differential	.205	.12	.12	.12	.125	.125
Class C, night shift	2.46	2.68	2.80	2.83	2.945	2.975
Class C, day and afternoon shifts	2.29	2.64	2.76	2.79	2.90	2.93
Differential	.17	.04	.04	.04	.045	.045

The agreement provided that an added retroactive sum payment be made for the period between November 4, 1968 and January 6, 1969. The sum was based on the rate of the employee's job on January 6, 1969. The arrangement was arbitrary and temporary. Plaintiff does not request that a recomputation be made for this period, and none is ordered by the court.

[5] Agreement, Corning Glass Works and American Flint Glass Workers' Union of North America, A.F.L.-C.I.O., January 4, 1969, Article XV, Section 2.

[6] 319 F.Supp. at 1171.

[7] There is no question that women as well as men have the opportunity to work at night. Between January 20, 1969 and December 27, 1970, 140 males and 274 females filled 524 vacancies on Inspector Class B jobs on the day and afternoon shifts in A and B Factories. Similarly, 72 males and 80 females filled 179 vacancies on the steady night shift. In the Pressware Plant, 56 males and 158 females filled 380 General TV Inspector vacancies on the day and afternoon shifts, while on the steady night shift 39 males and 46 females filled 114 vacancies.

[8] Defendant further argues that the January, 1969 agreement does not violate the Act because no rates were reduced, that, instead, the rates of all inspectors were increased. For example, an employee who was performing any of the three inspection jobs on the steady night shift under the wage rate in effect prior to January 4, 1969, and who transferred to the day shift under the wage rate in effect after January 4, 1969 received a wage increase, not a decrease, as a result of the agreement.

This argument is obviously without merit. To find out whether rates are discriminatory, they must be compared on the same day, not on the day before and the day after an increase.

[9] 319 F.Supp. at 1164-65.

[10] The parties agree that the statute of limitations bars relief prior to November 1, 1964. *Id.* at 1163.

APPENDIX D

Congressional Record—House

• • • matter. Congress delegated that authority to write regulations, to write the law, so do not question that. We are not even considering that here."

That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor even to issue interpretative regulations.

I emphasize that interpretative regulations are also barred. Interpretative regulations involve a case where there is an ambiguity in the law which admits of two or more constructions. Then in that case, if we have given interpretative regulatory authority, the Secretary moves in and tries to say what we meant between the two or three constructions. He does not have such authority here. The Secretary, in my opinion, has the inherent authority to write interpretative bulletins. All this amounts to is telling the public the Secretary's interpretation of the law for the guidance of those who are to be regulated. Such bulletins have no standing in court, but they are there as a guidance to the court as to what the view of the administrator was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected. He is not in violation if he has done something in reliance upon those interpretative bulletins.

One final point, I would like to ask the gentleman from Michigan [Mr. O'Hara], if I may, to respond to this.

We have been concerned here in a situation where an employer is bound by an existing agreement as to a wage differential. The Labor Department and the courts say that agreement violates this act—it discriminates against women. It is my view, and I think it is the view of the gentleman from Michigan and the view of our subcommittee that this bill as now written obligates the union and gives the union the responsibility to negotiate in this case to eliminate the discrimination and gives the Secretary of Labor, if necessary, the power to enjoin not only the employer but the union, to sit down and negotiate and eliminate the discrimination in violation of this act.

Mr. O'HARA of Michigan. Mr. Chairman, will the gentleman yield?

Mr. GOODELL. I yield to the gentleman.

Mr. O'HARA of Michigan. Mr. Chairman, the language of the bill on line 7, page 3, reads:

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

It is my understanding, as it is the understanding of the gentleman from New York that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act.

Mr. GOODELL. I would stress the word "maintaining" in your reply, because we feel that the words "shall cause

or attempt to cause" put an obligation on a labor union, as well as the employer, to change that existing agreement, if the agreement is in violation of this act and this requires the employer to violate the act. Does the gentleman agree?

Mr. O'HARA of Michigan. I would agree. Not only does it refer to new agreements but to an existing agreement where a labor organization would attempt to maintain a discriminatory pattern in an old agreement and resist efforts to change to the pattern required by this act.

Mr. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill:

First. Differences in pay that exist between women alone are not covered by this act.

Second. Differences in pay that exist between men alone are not covered by this act.

Third. Differences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by this act.

Fourth. Only those jobs that are the same and normally related shall be compared.

Fifth. Normally the jobs that are compared will be physically located in the same work area or will fall within closely related job classifications.

Sixth. Differences in pay that are based upon historical and widely accepted differences in job content will not be challenged, if not based on sex.

Seventh. Differences in pay that are based upon a bona fide job classification system will not violate this act, if not based on sex.

Eighth. It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system. It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems. This sole obligation is to uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination.

Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.

Tenth. A difference in pay between male selectors and packers and female selectors and packers who work on the same production line and have the same duties and responsibilities would be invalid.

Eleventh. A difference in pay between male selectors and packers and female selectors and packers would be valid if, in addition to the duties performed by the female selectors and packers, the male selectors and packers are required to lift the crates off of the assembly line, or sweep up the room or work on the loading dock during slack periods.

Twelfth. An installer's job on an assembly line that, for example, requires soldering could not be compared or equated with a welder's job.

Thirteenth. A truck driver's job and a tug operator's job are dissimilar.

Fourteenth. The work of a machine operator and the work of a skilled machinist cannot be equated.

Fifteenth. Plant and office clerical assignments are normally distinguishable.

Mr. Chairman, the majority views and supplemental views, follow:

Equal Pay Act of 1963—Majority Views and Supplemental Views

BACKGROUND

Legislation to eliminate wage discrimination based upon sex of the employee has been recommended by the present and two immediately preceding administrations.

During World War II the War Labor Board promulgated and administered an equal pay for women policy.

During the 87th Congress the Committee on Education and Labor considered a number of equal pay bills, reported favorably to the House of Representatives and a bill was enacted. The other body also acted favorably on equal pay legislation, but its affirmative action took the form of an amendment to a House-approved bill, the subject matter of which was outside the jurisdiction of the Committee on Education and Labor.

109 Cong. Record, House, May 23, 1963

Following the convening of the 88th Congress many Members of the House of Representatives reintroduced bills they had sponsored during prior Congresses. On February 14, in a letter to the Speaker of the House of Representatives, Secretary of Labor Willard Wirtz recommended enactment of equal pay legislation and submitted a draft bill.

These bills were assigned to this committee's Special Subcommittee on Labor for hearings and preliminary consideration.

The bill (H.R. 6060) represents the results of this deliberation.

Oral testimony was heard from 20 witnesses, and many statements and letters were submitted for the record.

The committee was impressed by these points:

1. Proponents urged legislation that would protect maximum numbers of employees, and that had enforcement procedures.

2. Some witnesses expressed concern that they might be faced with unusual difficulties in adjusting to an entirely new Federal program administered by a new agency.

3. Many of the separate provisions of the administration's proposal closely parallel provisions of the Fair Labor Standards Act.

4. A number of witnesses recommended that various specific provisions be rewritten in precisely the terms of the Fair Labor Standards Act; and one witness recommended that elimination of sex-based wage discrimination be accomplished by amending section 6 of the Fair Labor Standards Act.

109 Cong. Record, House, May 23, 1963

PURPOSE AND SUMMARY OF MAJOR PROVISIONS

This bill amends the Fair Labor Standards Act to provide that payment of a discriminatory wage rate, where the discrimination is based on sex of the employee, shall in the future be a violation of the Fair Labor Standards Act.

The Fair Labor Standards Act provides that workers must be paid a decent minimum wage, that if employees must put in long hours, they must be paid at an overtime rate, and that children may be employed only under rigid conditions which protect their health and safety.

The bill (H.R. 6060) would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex.

Because of the long history and experience of Government and business and workers with the Fair Labor Standards Act, a simple expansion of that act to include the equal pay concept offers the most efficient and least difficult course of action.

The Fair Labor Standards Act has been on our statute books now for almost a quarter of a century.

Over that time the Wage and Hour Division of the Department of Labor, which has the responsibility for enforcement of such act, has developed a now familiar system of investigation, administration, and enforcement, which will be utilized fully to complement the new provision. Moreover, Secretary of Labor Willard Wirtz in a letter to the committee has given his assurance that he will assign the administration of the equal pay legislation to the Wage and Hour Division. Very few, if any, new employees will be required to enforce the act.

Such utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation; and second, compliance should be made easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions.

Perhaps the most worthy result in this approach is in the question of coverage. This bill neither extends nor curtails coverage of the Fair Labor Standards Act but simply provides that those employers and employees who are presently covered by that act shall be covered by the new provisions relating to equal pay for equal work, regardless of sex. The Fair Labor Standards Act covers an estimated 27,500,000 employees.

Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based solely on the sex of the employee are an unfair labor standard. The lower wage rate must be increased to the level of the higher.

The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

Section 4 provides a 1-year moratorium on enforcement as to all employees and employers. In addition, in the case of employees covered by bona fide labor-management contracts, enforcement is deferred for 1 additional year or until the termination of the contract whichever occurs first.

During this "grace period" your committee expects the Secretary of Labor to make such changes in the administration of the Fair Labor Standards Act as are necessary to reflect this amendment. The committee would anticipate that, at an early date, full information including material to be posted, would be given employers and employees covered by the Fair Labor Standards Act. We would

expect that by informal methods of conference, consideration, and persuasion, efforts would be made to achieve voluntary compliance.

The proposed grant of authority to the Secretary of Labor to issue regulations in connection with the administration and enforcement of this program was eliminated by the subcommittee. The Secretary of Labor will have only the specific and limited regulatory authority for the enforcement and administration of the Equal Pay Act which he has under the present Fair Labor Standards Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in black brackets, existing law in which no change is proposed is shown in roman):

SECTION 6 OF THE FAIR LABOR STANDARDS ACT OF 1938

"SEC. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

"(2) if such employee is a homeworker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate

prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor, or his authorized representative, shall have power to make such regulations or orders, as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such homework employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term 'homeworker'; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by homeworkers;

"(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the

special industry committees provided for Puerto Rico and the Virgin Islands by this Act as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection.

"(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s)(3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

"(1) not less than $1 an hour during the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter;

"(2) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate

prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement).

"(c) The rate or rates provided by subsection (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5: *Provided,* That (1) the following rates shall apply to any such employee to whom the rate or rates prescribed by subsection (a) would otherwise apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, increased by 15 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1961 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

"(B) Beginning two years after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 10 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

"(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1961 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any

such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(2) In the case of any such employee to whom subsection (b) would otherwise apply, the Secretary shall within sixty days after the enactment of the Fair Labor Standards Amendments of 1961 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with

the standards prescribed by section 8, not in excess of the applicable rate provided by subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1961.

"(3) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.

"[(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, be-

tween employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"[(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

"[(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

"[(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.]"

SUPPLEMENTAL VIEWS

Last year the equal pay for women bill was substantia amended during consideration on the House floor. Ho ever, the administration this year adopted only a few the changes made on the floor last year. Its proposal w embodied in H.R. 3861. On March 25 Congressman Go ELL introduced a new proposal, H.R. 5605, to place adm istration and enforcement of equal pay legislation un the Fair Labor Standards Act. Virtually all of the p posals of the Goodell bill were accepted by the House s committee, and are now embodied in H.R. 6060.

Since this bill now before the House differs substantia from either last year's proposals or this year's administ tion bill, we feel that these changes should be pointed o The following are the major differences between the reported by the full Education and Labor Committee a the earlier administration proposal. Under the commit bill:

1. The prohibition against discrimination because of is placed under the present Fair Labor Standards A with the act's established coverage of employers and e ployees.

2. All of the fair labor standards exemptions ap Agriculture, hotels, motels, restaurants, and laundries excluded. Also, all professional, managerial, and adm istrative personnel, and outside salesmen are excluded.

3. Investigation and administration will be under existing Wage and Hour Division, thus avoiding the c tion of a vast new bureaucracy.

4. Enforcement must be obtained in the Federal courts and not arbitrarily through an all-powerful administrative body.

5. The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor.

6. The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

7. A specific exception has been added for a system which measures earnings by quantity or quality of production.

8. A general exception has been added for differentials based on factors other than sex.

9. As the act does not take effect for 1 year following the date of enactment, time is provided for voluntary adjustment.

10. Where there is a bona fide collective bargaining agreement, the act will not apply for an additional year, or at the expiration of the agreement, whichever occurs first.

11. The Secretary of Labor is not given broad regulatory and rulemaking authority.

12. The proposed power of the Secretary of Labor to blacklist Government contractors who allegedly discriminate against women has been eliminated.

PETER FRELINGHUYSEN, JR
WILLIAM H. AYRES.
ALBERT H. QUIE.
CHARLES E. GOODELL.
ALPHONZO BELL.

The CHAIRMAN. The time of the gentleman has expired.

Mr. RYAN of New York. Mr. Chairman, I support H.R. 6060, the equal-pay-for-equal-work bill.

I should like to commend our colleague, the gentlewoman from Oregon, EDITH GREEN, for her role in advancing this legislation. She has introduced equal pay bills ever since her election to the House. Last year she sponsored the administration bill for equal pay. As a member of the President's Commission on the Status of Women, the gentlewoman from Oregon [Mrs. GREEN] has worked with dedication and determination to see that women receive equal treatment with men in employment.

Mr. Chairman, I support this bill to provide justice in the pay envelope to both men and women by forbidding employers in interstate commerce to discriminate among their employees on the basis of the sex of the worker in setting rates of pay.

Discrimination in the form of a rate differential for comparable work when performed by women instead of men is based on the incredible notion that a woman, although she may accomplish as much or more, deserves less pay than • • •